

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1418

To be argued by
LAWRENCE IASON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1418

UNITED STATES OF AMERICA,

Appellee,

—v.—

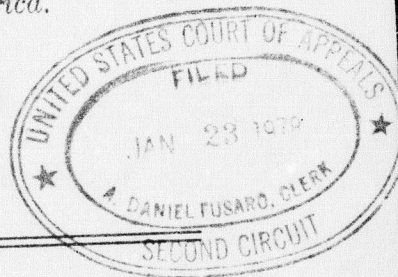
DAVID CAMPBELL and MICHAEL TARTT,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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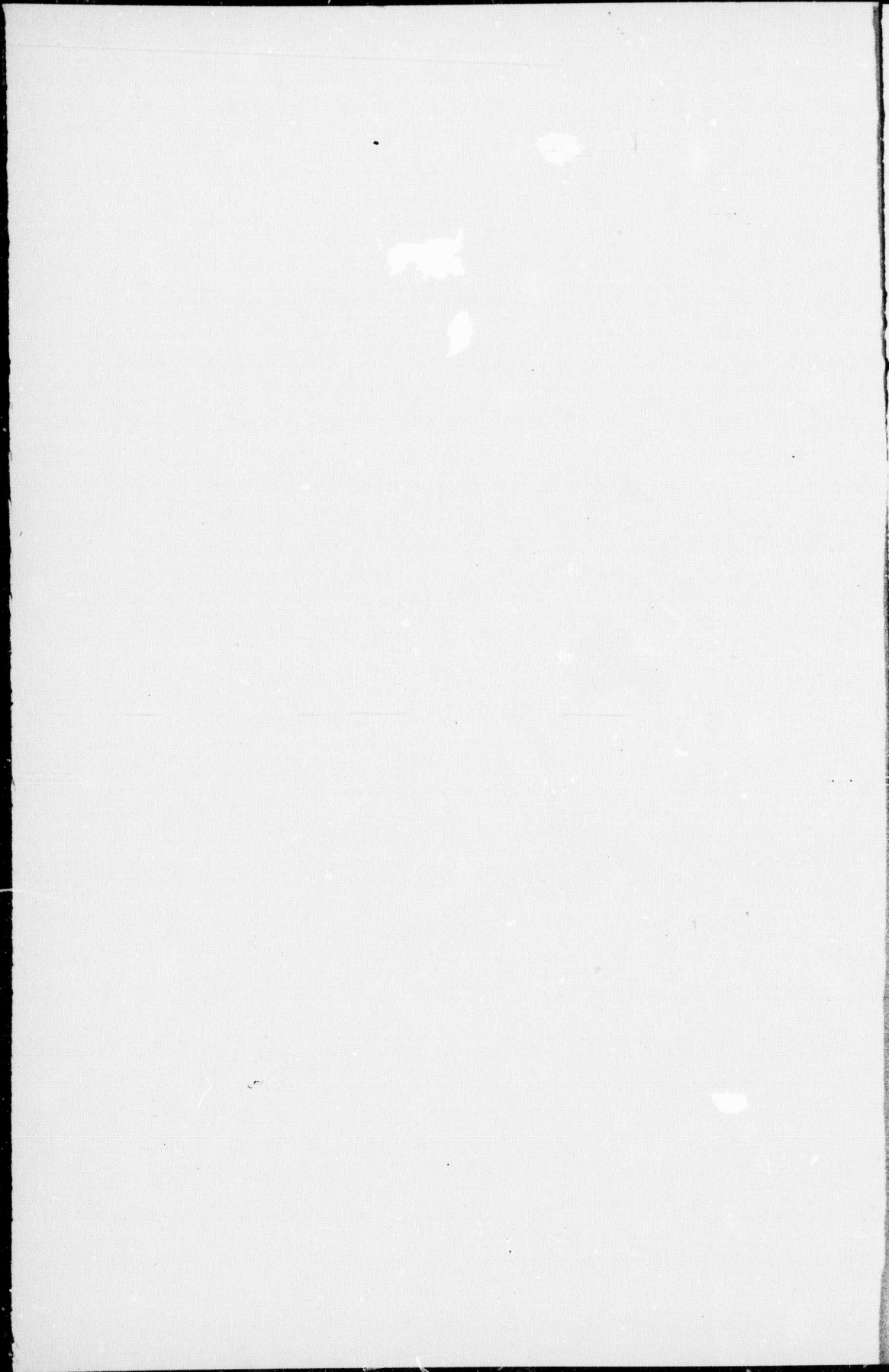


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UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVID CAMPBELL and MICHAEL TARTT,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

David Campbell and Michael Tartt appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on September 19 and 26, 1977, following an eight day jury trial before the Honorable Lawrence W. Pierce, United States District Judge.

Indictment 77 Cr. 278, filed on April 14, 1977, charged Campbell and Tartt in count one with conspiracy to commit armed bank robbery, in violation of Title 18, United States Code, Section 371, and in counts two and three with bank robbery and armed bank robbery, in violation of Title 18, United States Code, Sections 2 and 2113(a) and (d).

Prior to trial both defendants made motions seeking the suppression of evidence seized in their apartments at

the time of their arrests. After conducting a five day hearing Judge Pierce denied these motions in all respects in an unreported opinion. (S.D.N.Y. September 20, 1977). Trial began on July 18, 1977, and concluded on July 27, 1977, when the jury found Tartt guilty on all three counts and Campbell guilty on the conspiracy count.*

On September 19, 1977, Judge Pierce sentenced Campbell to a term of imprisonment of four and a half years. On September 26, 1977, Judge Pierce sentenced Tartt to a term of imprisonment of five years on count one and 10 years on count three, the sentences to run concurrently.

Both defendants are in custody serving the sentences imposed by Judge Pierce.

Statement of Facts

Synopsis

On April 4, 1977, after weeks of conversations about their need for money and desire to rob a bank, David Campbell, Michael Tartt and Wallace Hall held up the branch of the Chemical Bank located at Cathedral Parkway and Broadway in Manhattan. Inside the bank, Hall pulled out a .32 caliber revolver and Campbell brandished a sawed off shotgun. Tartt grabbed \$1800 from the hands of a teller and then scooped approximately \$17,200 from the tellers' cash drawers.

* Campbell was found not guilty on the two substantive counts.

When Hall left the bank, he ran to a subway station where he was quickly arrested. Within a short time Hall admitted robbing the bank. He then identified his accomplices as Mike and Dave, said he did not know their last names, but described each of them and explained where they lived. Later that same day, after agents of the Federal Bureau of Investigation verified the information provided by Hall and obtained surveillance photographs taken during the robbery, Tartt and Campbell were arrested in their own apartments.

The Government's case against Campbell and Tartt was proved through the testimony of Hall, their accomplice,* tellers who identified Tartt in court, surveillance photographs and certain evidence seized at the defendants' apartments at the time of their arrests.

The Proof At Trial

1. The Government's Case

A. Campbell, Tartt and Hall Plan to Rob a Bank

Beginning sometime in March, 1977, Campbell, Tartt and Hall discussed their need for money and the possibility of robbing a bank on 207th Street, near the building where all three men lived.** During the initial conversation in which their illegal venture was hatched, Hall referred to his .32 caliber revolver, and Campbell said he was going

* Hall pleaded guilty to a charge of bank robbery and, following the trial, was sentenced by Judge Pierce to a term of imprisonment of four years.

** Campbell, Tartt and Hall all lived in the same building on Academy Street in Manhattan.

to get a shotgun from Junior Hamilton, Campbell's brother.* (Tr. 120-30).**

Quickly putting their plan into operation, Campbell, Tartt and Hall first checked out the bank on 207th Street, but decided not to rob it because it was too big and too close to where they lived. (Tr. 131-136). On March 31, 1977, Tartt told Campbell and Hall that the Chemical Bank located on 110th Street had no guards.*** Tartt said he was familiar with this bank because it was the one at which his wife used to cash her checks.**** (Tr. 137-138). Four days after this conversation, Tartt, Campbell and Hall robbed the Cathedral Parkway bank.

B. The Robbery

On the morning of April 4th, Campbell, Tartt and Hall drove to the corner of Cathedral Parkway and Broadway, entering the bank at approximately 10:25. (Tr. 149-152). Inside the bank Hall pulled out his .32 caliber revolver, and Campbell pulled out a sawed off shotgun. Meanwhile, Tartt shoved a customer, then vaulted the tellers' counter and grabbed \$1800 from a teller's hand. Tartt yelled out "everybody to the . . . wall," then scooped \$17,200 from the tellers' drawers and stuffed the money into a white canvas bag. Their mission quickly completed, the robbers then made their

*Two days before the bank robbery Hamilton brought the shotgun to Hall who then took it to David Campbell.

** The trial transcript will be referred to as "Tr."; the transcript of the suppression hearing will be referred to as "S"; references to the District Court's opinion denying the suppression motion are cited as "Op;" references to Government Exhibits introduced at trial are cited as "GX"

*** The correct street address of this bank 543 Cathedral Parkway.

**** Tartt's wife actually had a savings account at this bank. GX 13 was the application form she filled out in opening the account.

getaway. Campbell and Tartt ran out of the bank, followed by Hall. (Tr. 152-157). However, Hall was unable to find Campbell and Tartt when he reached the street, and he fled into a subway station. (Tr. 169-170).

At trial, two of the bank tellers identified Michael Tartt as the robber who vaulted the teller's counter. The same tellers also identified the checkered pants and dark blue jacket, found in Tartt's apartment when he was arrested, as clothing worn by Tartt during the robbery. (Tr. 46-48, 80-82.)

C. The Arrests

Hall was arrested in a subway station near the bank a few minutes after the robbery. The police officer who arrested Hall also found the revolver Hall carried during the robbery. (Tr. 171-72).

After his arrest, Hall admitted to the bank robbery and later identified his accomplices as "Mike" and "Dave." Hall said he did not know their last names but said that they lived in the building where he lived on the corner of Academy Street and Post Avenue. (S. 321). Later on Hall gave a general description of "Mike" and "Dave." (S. 152; Tr. 321-322).

Meanwhile, FBI agents, led by case agent Joseph Martinolich and assisted by New York City police detectives, attempted to corroborate the information provided by Hall and to identify further his accomplices. The agents interviewed bank witnesses, sought additional details about "Mike's" and "Dave's" apartments and arranged to have the surveillance photographs developed. (S. 156-60).*

* The surveillance photographs, which depicted the robbers in the course of the holdup, were introduced in evidence at the trial. (GX's 10 and 33).

After collecting additional information which corroborated Hall's version of the events, as well as surveillance photographs which facilitated identification of the other robbers, at approximately six o'clock, agent Martinolich led a group of detectives and agents to Tartt's apartment where Tartt was arrested. A second group of agents and detectives went to Campbell's apartment and arrested him. (S. 204, 210-11, 215-27). At the time of defendants' separate arrests, the agents seized various articles of clothing, money from the robbery, and a shotgun.

2. The Defense Case

A. Campbell

Campbell called three alibi witnesses and testified in his own behalf. Fred Schmal testified that he saw Campbell at 10:40 a.m. on Monday, April 4, 1977 on the corner of Academy Street and Sherman Avenue. Schmal said he remembered seeing Campbell that day because Campbell had repaid a ten dollar loan. On cross examination, Schmal admitted that, in an interview earlier on the day he testified, he said he remembered that the day he saw Campbell was Thursday April 14th, and that he had remembered the day because Campbell always repaid loans on Thursdays, Campbell's pay day. (Tr. 493-495).

Leroy Caldwell testified that he saw David Campbell on Academy Street between 10:30 and 11:00 A.M. on April 4, 1977. Caldwell said that after seeing Campbell he went home and then went to Campbell's apartment. (Tr. 510-513). Caldwell's wife testified that she saw Campbell on Academy Street talking to Mr. Caldwell between 10:45 and 11:05 on April 4th.

Campbell's testimony about the events of April 4th was internally inconsistent and contradicted the testimony of Schmal and the Caldwells.

Campbell confused the order in which he saw the alibi witnesses on April 4th. First, Campbell testified that he saw Fred Schmal before he saw Leroy Campbell (Tr. 569), later that he saw Caldwell before he saw Schmal (Tr. 580-81), and finally he reasserted that he saw Schmal first. (Tr. 597). Campbell was similarly confused about whether he saw Mrs. Caldwell before or after her husband visited his apartment. (Tr. 591). Campbell admitted under cross examination that he had looked at his watch only once, before leaving his house, and that although he had given specific times in his testimony, he could only estimate the times at which he claimed to have seen his alibi witnesses. (Tr. 570, 583, 591).*

Campbell corroborated Hall's testimony by admitting that the shotgun identified by Hall belonged to Campbell's brother Junior Hamilton, and that Hall and Hamilton brought the shotgun to Campbell's apartment before the robbery. (Tr. 576, 579). Campbell said he owned the suitcase that contained the \$10,000 found in his apartment, but did not know how the money arrived in his apartment. (Tr. 598-99). Campbell also admitted that the shotgun and shotgun shells were found in his apartment and that the two .32 caliber cartridges were found in the jacket he was wearing when he was arrested. He claimed, however, that he did not know how the shotgun, shotgun shells or cartridges came to be where each was found. (Tr. 598-99).

* Campbell also contradicted the Caldwells' testimony. Although Caldwell said that after first seeing Campbell he went home and then went to Campbell's apartment, Campbell said Caldwell walked with Campbell to Campbell's apartment and that Caldwell did not go first to his own home. Also, although Mrs. Caldwell said the window was closed when she saw Campbell, Campbell said it was open and that Mrs. Caldwell was talking to her husband. (Tr. 580).

B. Tartt

Michael Tartt called four defense witnesses and also testified in his own behalf. Robert C. Jones and Nathaniel (Dusty) Smith testified that they had keys to Campbell's apartment and nightstand. (Tr. 611, 626). Additionally, Jones and Arthur Lewis identified themselves as two of the three friends in Campbell's apartment when Campbell was arrested on April 4, 1977. (Tr. 610, 669).^{*} Jones testified that he arrived at Campbell's at approximately one o'clock, stayed until approximately 3:30 when he and Campbell left to buy cigarettes, and then returned to the apartment with Campbell where they met Arthur Lewis and another friend. All four men went into Campbell's apartment and stayed there until the police officers arrived. Jones said he did not bring the shotgun or money into Campbell's apartment and that he did not put the .32 caliber cartridges into Campbell's jacket. Jones also admitted that he did not see anyone else bring these items into the apartment. (Tr. 621-625). Lewis said he had been at the Campbell apartment from 3:30 p.m. until Campbell's arrest and that he did not bring the shotgun, money or cartridges to Campbell's apartment. (Tr. 669-70).

Michael Tartt testified and denied any participation in the bank robbery, claiming that on the morning of April 4, 1977 he worked on his job as a numbers runner. (Tr. 708-11). Tartt corroborated Hall by admitting that he had seen Junior Hamilton's shotgun when Hall and Hamilton brought it to Campbell's apartment before the robbery. (Tr. 706-07). Tartt admitted that he had a prior conviction for trying to pass a forged check to a bank. (Tr. 765-67). Finally, Tartt testified that it took twenty-five

^{*} At the time of Campbell's arrest there were three unidentified males in the apartment.

minutes to drive from 110th Street to the Academy Street area. (Tr. 752).*

3. Government's Rebuttal Case

Detective John Stein testified that it takes ten to fifteen minutes to drive from 110th Street and Broadway to Post Avenue and Academy Streets, (Tr. 821-822) thus supporting the Government's position that Campbell readily could have returned to his neighborhood after robbing the bank in time to be seen there by Schmal and the Caldwells shortly after the robbery.**

ARGUMENT

POINT I

The District Court Correctly Denied Defendants' Suppression Motions.

Introduction

Tartt and Campbell contend that the District Court committed reversible error in denying their motions to

* Tartt also testified about his need for corrective eyeglasses and called an ophthalmologist who said Tartt needed eyeglasses. (Tr. 720-723, 777-782). This evidence was designed to support an argument that the bank surveillance photographs of the man identified as Tartt did not show eyeglasses and that Tartt therefore could not have been the bank robber. However, the photographs were far from clear on this aspect of Tartt's appearance. If the photographs are examined closely, Tartt does appear to be wearing glasses. (GX's 10A, 10D, 33A).

** Stein and FBI agent Martinolich also contradicted Tartt's claim that Tartt was hit when he was arrested. (Tr. 784, 794).

suppress evidence seized when they were arrested.* Although both defendants recognize that there was probable cause for their arrests (Campbell Br. 15; Tartt Br. 20), they contend that the daytime arrests nevertheless were unlawful because executed without warrants in their apartments. Additionally, Campbell claims that even if his arrest was lawful, the evidence seized in connection with his apprehension should have been suppressed. In the District Court, Judge Pierce considered these claims at length and, after an extensive five-day suppression hearing, ruled that the defendants' arrests were lawful, that warrants were not necessary and that the arrests were made under exigent circumstances. Moreover, Judge Pierce concluded that the searches undertaken in the de-

* The evidence found in Campbell's apartment, which the Government offered at trial was: (1) \$10,000, including several bills the serial numbers of which matched those of bills whose numbers had been recorded by the bank before the robbery; (2) a black vinyl suitcase; (3) a shotgun and shotgun shells; and (4) a white ski cap and a winter jacket which were worn by the bank robbers. When Campbell was searched at the police precinct later that evening, two .32 caliber cartridges were found in a pocket of the jacket he was wearing. According to his brief, the "only items whose admissibility Campbell contests are the shotgun and shells taken from the locked nightstand in Campbell's bedroom and the money . . ." (Br. 15).

The evidence found in Tartt's apartment and offered by the Government was a pair of checkered pants and a blue coat which appeared to have been worn by one of the bank robbers. Also taken from Tartt's apartment was \$800 in cash, which was not offered because the Government had no evidence to connect it with the bank robbery. During Tartt's cross-examination he was asked about statements he made to FBI agents after his arrest. Some reference to these statements was made during the Government's rebuttal case. Tartt did not object when his post-arrest statements were referred to in his cross-examination or in rebuttal, and he has not referred to them in his brief filed with this Court. Tartt's position, therefore, appears to be that the only evidence erroneously admitted was the checkered pants and the blue jacket.

defendants' apartments properly were incident to the lawful arrests and that Campbell voluntarily consented to the search of his apartment. We submit that the findings of the District Court on these matters were clearly correct and supported by the record. While defendants have attempted on this appeal to suggest the presence of an unsettled broader constitutional issue with respect to the propriety of warrantless arrests, that issue simply is not squarely before the court in this case. Under established and settled law, the denial of defendants' suppression motions was proper and defendants' principal attack on their convictions should be rejected.*

1. The Circumstances Leading To Defendants' Arrests

Campbell and Tartt were arrested on the same day that they held up the Chemical Bank. At the time of the arrests the FBI agents and police officers had substantial evidence to believe: (1) that Campbell and Tartt had committed the bank robbery for which they were arrested; (2) that they were armed; (3) that they were together; and (4) that flight was imminent. (S. 210).

Hall was arrested and his handgun recovered between 10:45 and 11:00 in the morning. He was taken from

* This suppression issue is the only claim made by Campbell and the principal claim raised by Tartt. Neither defendant raises any question about sufficiency of the evidence, which in fact was overwhelming. Not only were both defendants identified by Hall, the third bank robber, but there was substantial additional evidence. As to Tartt, this evidence included identification by two bank tellers, the fact that his wife had an account at the bank—corroborating what Hall testified Tartt had told him—and the checkered pants and blue jacket found in Tartt's apartment when he was arrested. As to Campbell, the evidence against him included Hall's testimony, along with the shotgun, shotgun shells, .32 caliber cartridges, the \$10,000 and the clothing, all of which was recovered when Campbell was arrested.

the subway station to the bank where witnesses identified him as one of the bank robbers. Detective Stein advised Hall of his rights while they were at the bank, then met with Hall again at the nearby station house at approximately 12:45 or 1:00 p.m. Sometime between 1:00 and 2:00, Hall told Stein that he, "Mike" and "Dave"—whose last names he did not know—were the bank robbers and that all three lived in the building on the corner of Academy Street and Post Avenue. Detective Stein relayed this information to FBI agents between 2:00 and 2:15. Meanwhile, Hall had made a telephone call to a relative while at the station house. (S. 312-17).

Stein and two other police officers drove to the neighborhood where the three bank robbers lived, attended a meeting at around 3:00 p.m., during which some of the officers had a late lunch, then went to the 34th Precinct to wait for the FBI agents who were working on this case. (S. 318-20).

During the period of Hall's interrogation, FBI agents were conducting their part of the investigation. They had taken film from the bank surveillance cameras to a film laboratory in Long Island City. (S. 151). Other agents had obtained descriptions of the suspects from witnesses who were interviewed at the bank. (S. 156). At approximately 4:00 p.m., Special Agent Joseph Martinolich, the agent with the responsibility for organizing the FBI investigation, interviewed Hall in order to clarify certain discrepancies in Hall's earlier statements as well as to obtain additional details about the building where Hall and his accomplices lived, and about the apartments "Dave" and "Mike" occupied. (S. 146-47, 159). Prior to Martinolich's interview with Hall, police officers had gone to the building at Academy Street and Post Avenue and had told Martinolich of an apparent discrepancy between the building and Hall's information. Initially Hall had stated that the building was at 579 Academy Street

and that "Mike" [Tartt] lived in apartment 4B. Apparently, 579 Academy Street did not have an apartment 4B. When Martinolich questioned him, Hall explained that the building he referred to as 579 Academy Street was one building that had two addresses—571 and 579 Academy Street—and that "Mike's" [Tartt's] apartment 4B was in the 571 side. (S. 106). Hall told Martinolich that the entrance to "Dave's" [Campbell's] apartment was on Post Avenue and that there was a blue rug in front of "Dave's" [Campbell's] apartment. This information was then verified by police officers. (S. 159-64). Hall also told Martinolich that "Mike" and "Dave" probably would be together and in one or the other of their apartments. (S. 178, 204).

After interviewing Hall, Martinolich spoke to an Assistant United States Attorney who advised Martinolich to arrest Tartt and Campbell. (S. 182). Martinolich then left FBI headquarters and drove to Long Island City to pick up the photographs taken by the bank surveillance cameras. (S. 174-75). After picking up the photographs, Martinolich met with police officers and other FBI agents at the 34th precinct at approximately 5:15 or 5:30 p.m. An arrest plan was discussed, assignments were made and the surveillance photographs distributed. (S. 180-81). The officers split up into two groups, with one of the groups assigned to the Campbell apartment and the other group assigned to the Tartt apartment. The two groups drove to Academy Street and Post Avenue where the arrests were made at approximately 6:00 p.m. (S. 211, 215).

One group of agents and detectives went to the door of Campbell's apartment, knocked on the door and identified themselves as FBI agents and police officers. Campbell opened the door and was immediately arrested by the agents. Inside Campbell's apartment were three unidentified black mates. (S. 12-15).

The second group of officers went to Tartt's apartment where they too knocked on the door and stated

"FBI, police, open up." Tartt, however, did not respond. From outside the door, the agents heard the noise of someone running away from the door in the apartment. Concerned that Tartt either might be running for his shotgun or attempting to escape, the agents forced open the door and arrested Tartt in his bedroom. Hiding inside a closet at the time were Tartt's wife and child. (S. 215-20).

The defendants stipulated that when they were arrested it was not yet nighttime. (S. 328).

2. The Tartt and Campbell Arrests Were Lawful

The District Court found that no warrant was required because the Campbell and Tartt arrests were made under exigent circumstances. (Op. 10). The factual findings underlying this conclusion, made by the trial Judge who conducted the suppression hearing and who was in the best position to evaluate the facts, *United States v. DeLeon*, 561 F.2d 421, 423 (2d Cir. 1977), are entitled to great weight and must be upheld unless "clearly erroneous." Cf. *United States v. Wiener*, 534 F.2d 15, 17 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976). The facts established at the suppression hearing plainly support the District Court's determination that the law enforcement officers acted reasonably, effectively and with dispatch to identify and apprehend the armed perpetrators of the robbery before they could flee.

There had been an armed bank robbery at approximately 10:30 in the morning. Two of the bank robbers, armed with a sawed off shotgun, had escaped. Police officers and FBI agents cooperated throughout the day in a speedy but comprehensive investigation. The one bank robber who had been arrested immediately after the robbery was interviewed repeatedly to obtain as much information as possible about his accomplices and their whereabouts and to resolve, for the sake of reliability of his information, certain discrepancies which had arisen. The information from Hall was confirmed and expanded

upon by two separate inspections of the neighborhood and the building. Witnesses to the crime were interviewed, and their descriptions of the bank robbers compared with those provided by Hall. The bank surveillance photographs were taken to Queens because a laboratory there provided the fastest service for developing the film used by the Chemical Bank in its surveillance cameras. (S. 177). Finally, once the agents were sure of the accuracy of the information supplied by Hall and of the descriptions of his accomplices, a careful arrest plan was formulated and followed. When evaluated in the context of the purposes of the agents' investigative actions—to verify Hall's information and to particularize the descriptions of his accomplices—as well as their constant concern that the other armed robbers, possibly suspicious of Hall's whereabouts, might flee, it is apparent, as Judge Pierce found, that the circumstances were exigent and allowed no room for the delay which would have been occasioned by obtaining an arrest warrant.

Tartt and Campbell claim, however, that the circumstances could not have been truly exigent because during a mid-afternoon meeting of the detectives and agents assigned to the case, some of the officers ate lunch. In making this argument, the defendants disregard the informed determination of the district judge, who specifically credited agent Martinolich's testimony that the arrests were not made before six o'clock because the agents had been waiting for the surveillance photographs to be developed and were interviewing Hall and verifying information obtained from him until approximately 4:15 or 4:30.* The officers had not decided to arrest the men identified as "Mike" and "Dave" until they had corroborated the information from Hall and had obtained the surveillance photographs. This careful and reasonable

* At about 4:30 p.m., Martinolich and another agent drove to Queens to pick up the surveillance photographs and then went to the meeting at the 34th precinct to make the final plans for the arrests.

planning went on until the time Tarrt and Campbell were arrested and is in no way inconsistent with the finding of exigent circumstances.

Defendants also argue, more generally, that the Government had probable cause to arrest them as early as one or two o'clock in the afternoon. This claim overlooks the fact that at that time the statements of Hall were uncorroborated and the descriptions of "Mike" and "Dave" were incomplete. Indeed, it was not until well past 4:30 p.m. that the officers first had photographs of the robbers' physical appearances. During the afternoon the officers interviewed witnesses to the robbery, went to the Academy Street building to corroborate Hall's statements and picked up the surveillance photographs. The point of these efforts, of course, was to reduce the possibility of arresting innocent people based on uncorroborated allegations, as well as to minimize the danger to the arresting officers. In addition, the surveillance photographs were needed because of the difficulty of making arrests based on the description the agents had of "Mike" and "Dave." In fact, Hall had told Martinovich that "Mike" and "Dave" might be in front of the building, not in their apartments. The photographs were needed so that if several men meeting the general descriptions of "Mike" and "Dave" were outside the building, the arresting agents would be better able to identify the suspects, a matter of considerable importance since the robbers were armed. Thus, contrary to defendants' present contentions, the officers simply were not in a proper, reasonable and safe position to make specific arrests until they had obtained the surveillance photographs late in the afternoon of the day of the robbery.

Finally, at the point in time—late in the afternoon—when the agents had done all they could to learn the identities, physical appearances and whereabouts of the bank robbers, their prompt action to effectuate arrests without warrants clearly was appropriate. Although the

robbery still was a relatively recent event, having occurred a few hours earlier that day, the officers reasonably could conclude that the armed fugitives might have become unsettled with Hall's disappearance. Moreover, Hall had been permitted to place a phone call after his arrest and the danger clearly existed that, despite his alleged cooperation, Hall might have alerted Tarrt and Campbell to his arrest. *United States v. Mapp*, 476 F.2d 67 (2d Cir. 1973).^{*} To have delayed an arrest at this point obviously would have accentuated the risk that the armed and dangerous fugitives, fueled with the proceeds of the day's venture, would flee and go into hiding.

As the trial judge noted, the finding of exigent circumstances in this case parallels that in *United States v. Titus*, 445 F.2d 577 (2d Cir.), *cert. denied*, 404 U.S. 957 (1971). Where this Court also upheld a warrantless arrest, although one effectuated at nighttime. Titus was arrested at 1:30 in the morning in his girlfriend's apartment, four days after the bank robbery in question and several hours after his accomplice had been apprehended. In affirming the trial court's finding of exigent circumstances, the Court in *Titus* acknowledged the reasonableness of the police officers' actions in effectuating the more intrusive late nighttime arrest, as well as their concern that delay, in the circumstances presented,

^{*} In *Mapp* this Court upheld a search incident to a lawful nighttime arrest of Mapp's co-defendant, Mrs. Linda Walters, who was arrested after the arrest of Mapp. One of the principal reasons that the Court concluded that an arrest warrant was not required was that after Mapp had been arrested he was permitted to make a telephone call; "a call he might have placed to Mrs. Walters, warning her of the imminent danger of arrest." 476 F.2d at 74. The Court also relied on the possibility that Mapp might have been expected to return to Mapp's apartment and on the inference, based on that possibility, that Mapp's failure to return "might have alerted Mrs. Walters to possible danger, resulting in the destruction of evidence." *Id.* Hall, like Mapp, had been permitted to make a telephone call after his arrest, and his failure to return might have alerted Tarrt and Campbell

might occasion flight. The Court also observed that, although hindsight suggested that there might have been time to obtain an arrest warrant,

“[T]he Fourth Amendment does not require law enforcement officers to take such a nicely calculated risk of the escape of an armed robber even in order to make a nighttime arrest in a home.” 445 F.2d at 579.

We submit that Judge Pierce plainly was correct in finding that in this case, even more clearly than in *Titus*, the need to act quickly without waiting for a warrant arose through the course of events on the day of the robbery and justified the warrantless daytime arrests effectuated in this case.*

* In arguing that Judge Pierce's determination of exigent circumstances was clearly erroneous, Tarrt relies on *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970) (en banc). While *Dorman* does contain a list of factors which may be helpful in assessing exigent circumstances, the criteria set forth in that opinion hardly are exhaustive on this issue. One of the dangers of the *Dorman* approach is that it invites wooden application and quantification of the suggested factors, without a counterbalancing requirement that the law enforcement officers' actions be evaluated for their reasonableness in the totality of the circumstances presented, with flexibility to place greater emphasis on one factor or another in a given case. Moreover, *Dorman's* soundness must be questioned since it has been cited for the broader—and we submit incorrect—proposition that, save for exigent circumstances, a warrantless arrest in a dwelling is unconstitutional. See *contrary*, *United States v. Fernandez*, 480 F.2d 726, 740 n.20 (2d Cir. 1973); *United States v. Hall*, 348 F.2d 837, 841 (2d Cir.), *cert. denied*, 382 U.S. 947 (1965). Cf. *United States v. Mejias*, 552 F.W.2d 435 (2d Cir. 1977). In any event, even applying the *Dorman* criteria to this case, the soundness of Judge Pierce's finding of exigent circumstances is made apparent: the armed bank robbery involved was a “grave offense;” the “suspect[s] [were] reasonably believed to be armed;” there existed a “clear showing of probable cause;” there was “strong reason to believe that the suspect[s] [were] in the premises being entered;” there was a “likelihood that the suspect[s] would escape if not swiftly apprehended;” a “peaceable entry” was effected as to Campbell and a forcible entry was “justified” as to Tarrt, see *infra* at 20-21; and, the entries were not made at night. 435 F.2d at 382-93.

Moreover, in arguing that their arrests were illegal with an exclusive focus on the events which led the agents to the doorsteps of Campbell's and Tartt's apartments, the defendants ignore what transpired once the agents arrived outside their apartments—developments which provided independent justification for the warrantless arrests which ensued. Thus, in arguing that the finding of exigent circumstances was clearly erroneous, the defendants forget that the inquiry into the lawfulness of their arrests cannot end merely with the agents standing in a public place—outside their apartments—where they had a lawful right to be. If exigent circumstances did not exist prior to the agents' arrival outside defendants' apartments, contrary to defendants' suggestion the narrow issue presented is no more than whether the daytime arrests in their apartments were reasonable given the events which then occurred.

As to the Campbell arrest, the constitutional question posed is swiftly answered. The agents, standing in a public place, knocked on Campbell's door, properly identified themselves and, when Campbell voluntarily opened the door he was immediately arrested. This arrest clearly was proper.

In *United States v. Watson*, 423 U.S. 411 (1976) the Supreme Court held that law enforcement officers who have probable cause to believe a suspect has committed a crime may arrest the suspect in a public place, such as a restaurant, even if they do not have an arrest warrant and there are no exigent circumstances. Then in *United States v. Santana*, 427 U.S. 38 (1976), the Court extended *Watson* to allow officers to enter a home to make the arrest if the officers see the suspect in a public place, and the suspect then retreats into his home. Cf. *Warden v. Hayden*, 387 U.S. 294 (1967).

The reasoning and conclusion of *Santana* are directly controlling here. The agents and officers were acting lawfully when they knocked on Campbell's door. Once

Campbell opened the door and identified himself as "Dave," he was in a public place and his arrest without a warrant was lawful. *Cf. United States v. Mejias*, 552 F.2d 435, 443-44 (2d Cir. 1976).*

As to the Tartt arrest, while the matter requires some further discussion, the question is no more complicated than Campbell's and the constitutional issue no more difficult. As with Campbell, the agents, standing in a public place, knocked on Tartt's door, properly identified themselves and awaited a response from within. Unlike the Campbell arrest, however, the agents' inquiry was not answered by a verbal response, but by the noise of someone inside the apartment running away from the door. When it is remembered that the agents were there to seek a bank robber armed with a shotgun and fresh from his day's haul, the reasonableness of the officers' actions is readily apparent. Fearing that Tartt might attempt to escape or to reach the shotgun to resist them, the agents properly forced entry into the apartment and made the arrest. Under the circumstances as they

* Although the District Court's opinion does not make clear where Campbell stood in relation to his doorway when he opened the door, it does not matter whether he stood precisely in the doorway or on the residential side of the threshold. The Fourth Amendment is directed not to the niceties of property law but to reasonable expectations of privacy. *Katz v. United States*, 389 U.S. 347, 351-53 (1967); *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976), *cert. denied*, 97 S. Ct. 2930 (1977). Here, by voluntarily presenting himself at the door to the agents, Campbell negated any expectation of privacy that would bar his arrest. *United States v. Santana*, *supra*, 427 U.S. at 42. Furthermore, even if Campbell was not in a public place at the time, the degree of intrusion in the daytime arrest was minimal. Neither force nor a ruse was employed to gain entry and the defendant voluntarily opened his door to meet the agents' inquiry. If Campbell's arrest differs in substance from that upheld in *Santana* and *Mejias*, the difference simply is not significant and should not occasion a contrary result as a matter of constitutional law.

developed, the agents simply were not presented with any other reasonable alternative. While the intrusion as to Tartt was greater than as to Campbell, the agents' actions nevertheless were proper. Indeed, courts presented with similar situations regularly have upheld such entries for arrest when occasioned by circumstances that arise, as is the case here, at the threshold of the doorway. See e.g., *United States v. Mejias*, *supra* (forced entry proper when agents refused admission); *Salvador v. United States*, 505 F.2d 1348 (8th Cir. 1974) (arrest upheld where door opened "possibly" from force of knocking); *United States v. Shye*, 492 F.2d 886 (6th Cir. 1974) (arrest upheld where officers rushed in after door began to close). See also *Miller v. United States*, 357 U.S. 301, 302-08 (1958); *United States v. Titus*, *supra*; *United States v. Price*, 345 F.2d 256 (2d Cir.), *cert. denied*, 382 U.S. 949 (1965).

In sum, even if Judge Pierce's conclusion of exigent circumstances is rejected—and we strongly submit there is no basis to do so—the constitutional question presented is far narrower than the issue urged by defendants. In this case there simply is no reason to undertake the broad task of defining the circumstances, if any, under which a daytime arrest, made in a private dwelling on probable cause, will be held invalid for absence of a warrant.*

* Since we submit that the issue arguably raised in the context of this case must be resolved, if at all, in the Government's favor based upon the eminent reasonableness of the officers' actions here and the limited nature of the incursion into defendants' privacy interests, we need not unduly prolong this discussion with a broader defense of a daytime warrantless arrest effected in a private dwelling. Nevertheless, since defendants have raised the point by citation to a decision of this Court, some brief response is appropriate.

In arguing that a warrantless arrest, absent exigent circumstances, violates the Fourth Amendment if effectuated in a private dwelling, Tartt relies upon *United States v. Jarvis*, 560

[Footnote continued on following page]

Rather, the inquiry here need go no further than the reasonableness of the officers' actions in effectuating Campbell's and Tartt's arrests. The prevalence of estab-

F.2d 494 (2d Cir. 1977). However, defendant appears to have read that opinion before it was modified after the Government's petition for rehearing. This Court affirmed Jarvis' conviction, noting that the fingerprints obtained after Jarvis' arrest would have been obtained in any event, and that if the warrantless arrest was unlawful, that was harmless error. After the Government petitioned for rehearing in *Jarvis*, the language quoted by Tartt was replaced by the following sentence:

"There is therefore serious question whether the forcible entry into Jarvis' home without a valid warrant and in the absence of exigent circumstances meets the requirement of the statute or Fourth Amendment standards of reasonableness". 560 F.2d at 498.

Jarvis, in any event, is distinguishable since it involved a forced entry gained without announcement of identity, or any other factor suggesting exigent circumstances even at the doorway.

To the extent that *Jarvis* appears to suggest a general constitutional requirement of warrants for daytime arrests in a private dwelling, that decision comes against a longstanding series of cases in this Court which indicate a contrary principle. See, e.g., *United States v. DiStefano*, 555 F.2d 1094, 1100 n.5 (2d Cir. 1977); *United States v. Fernandez*, 480 F.2d 726, 742 n.20 (2d Cir. 1973); *United States v. Hall*, 348 F.2d 837, 841 (2d Cir.), cert. denied, 382 U.S. 949 (1965). But see, *United States v. Berenguer*, 562 F.2d 206 (2d Cir. 1977), where the issue was not decided but termed unsettled by this Court. Moreover, while the Supreme Court never has directly resolved the point, it has in a number of cases implicitly recognized that warrantless entries to effectuate an arrest are proper in many, if not all, circumstances, even without exigent circumstances. See, e.g., *Ker v. California*, 374 U.S. 23 (1963); *Miller v. United States*, supra; *Johnson v. United States*, 333 U.S. 10, 15 (1958). Indeed, the logic and rationale of the Supreme Court's most recent expressions on this topic directly support the notion that the place of arrest should not be controlling if there is probable cause to make the arrest. *United States v. Watson*, supra, 423 U.S. at 423-24; *United States v. Santana*, 427 U.S. 38 (1976). See also, *United States v. Watson*, supra, 423 U.S. at 427-32 (Powell, J. concurring).

lished law permitting entries into private dwellings to effect warrantless arrests as occurred here, *United States v. Watson*, *supra*, suggests that sound logic and reasonable policy support the practice. Good law enforcement practices and the public safety dictate that arrests such as the ones effected here be approved and encouraged rather than the contrary. Being empowered to make warrantless arrests,* law enforcement officers can take no more reasonable action than to proceed to the defendant's known residence, knock on the door, identify themselves and effect the arrest when the arrestee presents himself at the door as did Campbell. Nor is the conclusion altered when force is applied because of the possibly dangerous and evasive efforts undertaken by Tartt. The lawfulness of defendants' arrests here plainly is established on the careful, thorough and correct findings of the District Court and under prevailing principles of well-settled law.

3. The Evidence Recovered from Campbell's Apartment Was Properly Seized

Campbell also contends that even if his arrest was lawful, the seizure of the shotgun and shells and of the \$10,000 was not properly incident to his arrest. This argument, which was rejected in the District Court, cannot be sustained in view of the facts of this case, as found by Judge Pierce.

* The FBI agents here were empowered to make warrantless arrests pursuant to Title 18, United States Code, Section 3052, the parallel section to which was upheld as constitutional in *Watson*. New York Police Officers are explicitly permitted by statute to make warrantless arrests at any hour of the day or night, even in a dwelling, and may use "such physical force as is justifiable. . ." New York Criminal Procedure Law, § 140.15 (McKinney's 1971).

Before the agents and detectives went to Campbell's apartment, they had been told that they were looking for two armed bank robbers who probably were in the same apartment and who had a shotgun. Once Campbell identified himself as "Dave" and was arrested at the door, the officers had reason to expect Tartt to be in that apartment, armed with a shotgun, a concern which was heightened by the presence of three other unidentified males in Campbell's apartment. Under these circumstances, their immediate entry into and cursory search of the apartment were absolutely required. *United States v. Blake*, 484 F.2d 50, 57 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974); cf. *United States v. Montiehl*, 526 F.2d 1008, 1009-10 (2d Cir. 1975).

In the course of their immediate look-through the apartment, Detective Miele saw a black vinyl suitcase on a shelf in an alcove within reach of the apartment's occupants. Miele, concerned for the whereabouts of weapons, opened the suitcase to look for the shotgun, but instead saw about \$10,000 in cash. (S. 420-421). Meanwhile, in the course of the same search for Tartt, Agent Higgins came across a locked nightstand in Campbell's bedroom. Higgins asked Campbell for the key, and, at Campbell's request, one of his friends produced the key to the nightstand. When Higgins opened the nightstand, he found the shotgun and shells.

As the District Court found, these seizures clearly were proper. At the time, the agents had not yet secured the apartment for their own safety or to prevent against the destruction of evidence. There were four men—including Campbell—in addition to the detectives and agents in the apartment, and the agents had every reason to suspect that Tartt as well was present. The suitcase and nightstand could have been reached by Campbell, one of his friends or Tartt if he was present. Thus, the agents were justified in undertaking this limited search both as incidental to Campbell's arrest and because of the

exigent circumstance presented. *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Hayes*, 553 F.2d 824 (2d Cir. 1977); *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

In *United States v. Chadwick*, — U.S. —, 97 S.Ct. 2476, 2485 (1977) the Supreme Court reiterated the legitimacy of the action undertaken by the agents in this case:

"To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless 'search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.' *Chimel v. California*, 395 U.S. at 763. See also *Terry v. Ohio*, 392 U.S. 1 (1968)."

The Supreme Court in *Chadwick* also said that the arresting officers may not search luggage if the officer had reduced the luggage to his exclusive control and 'there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence" *Id.** In this case, however it cannot be said that the apartment was under control or that there

* To the extent *Chadwick* can be argued to narrow the search incident to arrest rule, that question is not presented by this case. First, as we set forth in the text following this footnote, the facts here are readily distinguishable from *Chadwick* and clearly come within the rule reaffirmed by that decision. Second to the extent that *Chadwick* suggests a narrower standard, this Court already has held that *Chadwick* should not be applied to searches which antedate the *Chadwick* opinion, as is the case in this situation. *United States v. Reda*, 563 F.2d 510 (2d Cir. 1977) (On reh.).

no longer was any danger. By contrast with *Chadwick*, where the arresting officers had opened a heavy trunk which contained marijuana an hour and a half after the trunk and the defendants had been transported to the Federal Building in Boston, here the situation was not secure when the officers promptly undertook the limited search. The officers had arrested one bank robber, had reason to fear that another bank robber, armed with a shotgun, was in the apartment, and there were three other friends of the arrested bank robber in the apartment. Under these circumstances the detectives and agents had to check throughout the apartment for any weapons. This necessity justified the search of the suitcase and also justified the search of the nightstand.

Finally, Campbell's claim is rendered totally without merit in view of the District Court's finding that Campbell "voluntarily consented to the search of his apartment and to the padlocked nightstand." (Op. 14). This finding of consent, which is supported by the facts established at the suppression hearing, must be upheld unless "clearly erroneous." *United States v. Wiener*, 534 F.2d 15, 17 (2d Cir.), cert. denied, 429 U.S. 820 (1976).

Upon his arrest for bank robbery, Campbell was told by the agents that they had information that he was involved in the bank robbery and believed that evidence of the robbery and money taken from the bank were in the apartment. The agents then asked Campbell for permission to search the apartment, and Campbell told them to "go ahead and search," claiming that there was nothing in the apartment. (S. 18-19). This consent was reaffirmed a few moments later when Agent Higgins noticed the locked nightstand in Campbell's bedroom and asked Campbell for the key. Campbell called to one of the other men in the apartment and told him to bring Higgins the key. When Higgins opened the nightstand, he found a shotgun and shotgun shells contained in a brown paper bag. (S. 19-22).

After scrutinizing Campbell's testimony at the suppression hearing and at the trial, the District Judge expressly found that Campbell was intelligent:

"Mr. Campbell is nobody's fool. He's testified on the stand and he's got his smarts." (Tr. 686-87).

Campbell was 38 years old and employed. (Tr. 549-50). He was arrested at his own home in the presence of three friends. Under these circumstances, the District Court correctly concluded that Campbell voluntarily consented to the search of his apartment. Consent, of course, can be voluntary even if the suspect is in custody. *United States v. Watson*, 423 U.S. 411, 424 (1976); *United States v. Wiener*, 534 F.2d 15, 17 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976). The court can find consent even if the suspect was not advised of his right to withhold consent as long as the consent was "essentially free and unconstrained" and the suspect's will had not been "overborne and his capacity for self-determination [had not been] critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). *United States v. Watson*, *supra*, 423 U.S. at 424; *United States v. Medico*, 557 F.2d 309, 312-13 (2d Cir. 1977); *United States v. Oliver*, 523 F.2d 253, 259 (2d Cir. 1975). In *Watson*, the Court listed five factors in evaluating whether consent was given freely: (1) was there any overt act or threat of force against the suspect; (2) were promises made or other forms of coercion used to impair the suspect's judgment; (3) was the suspect in custody; (4) was consent given while the suspect was in a police station or in public; (5) was the suspect a newcomer to the law, mentally deficient or unable in the face of a custodial arrest to exercise free choice; (6) was the suspect advised of his rights under *Miranda* and advised that the fruits of the search could be used against him.

No force was used against Campbell. (S. 28) No promises were made to obtain his consent. Although Campbell was in custody, he was in his own home, in the presence of three of his friends. Campbell was not a "newcomer to the law"; he had been arrested on three prior occasions and convicted twice.* The District Court made an express finding that Campbell was intelligent and knowledgeable. At least prior to his second consent, Campbell was advised of his *Miranda* rights.** Under these circumstances, the District Court's conclusion that

* See pages 2 and 3 of "Counsel's Affidavit in Support of Motion to Preclude Government from Cross-Examining Character Witnesses about Defendant's Prior Record" filed in the District Court.

** FBI agent Higgins, who led the group that arrested Campbell, testified that Campbell was advised of his rights before giving his first consent to search, when he told the agents to "go ahead and search" his apartment. (S. 18-19). Higgins also testified, however, that Campbell said "go ahead and search" when he was told that he was under arrest for bank robbery, which seems to have occurred almost immediately after Campbell was arrested. (S. 14). Higgins further testified that it was Detective Stein who advised Campbell of his rights. (S. 17-18). Stein had participated in the Tarrt arrest before he went to the Campbell apartment. (S. 340). In view of the fact that entry into the Tarrt and Campbell apartments occurred simultaneously (S. 204), it seems unlikely that Stein could have participated in the Tarrt arrest, then entered Campbell's apartment and advised Campbell of his rights prior to the time Campbell said "go ahead and search." Although Campbell probably was not advised of his rights before giving that consent, he had been advised of his rights before he reaffirmed his consent when he told his friend to give Higgins the key to the nightstand. The confusion in Higgins' testimony with respect to the timing of Campbell's advice of rights readily is understandable when it is recalled that his answer to this effect came in the middle of a confusing series of questions and certainly could have been misunderstood. Additionally, it is clear that during the time the officers were in the Campbell apartment they were under pressure to secure the apartment for the safety of all present. Under the circumstances it is understandable that Higgins could have confused the sequence in which the advice of rights and the consent to search took place.

Campbell voluntarily consented to the search of his apartment cannot be said to have been clearly erroneous.

4. The Admission of the Seized Evidence Did Not Prejudice Tartt

As noted earlier, Tartt does not attack the denial of his suppression motion beyond the claim that his arrest was illegal. Thus, if his arrest is upheld, as we submit it must be, the analysis as to him on this issue is concluded. Moreover, as far as Tartt is concerned, even if his arrest was unlawful and the evidence found in his apartment inadmissible, any error surely was harmless.

The only evidence found in Tartt's apartment that was introduced against him was a pair of checkered pants and a jacket. This evidence was insignificant in view of the overwhelming case against Tartt. Hall, his accomplice, testified at length about Tartt's participation in the bank robbery and planning for it. Hall stated that it was Tartt who suggested the bank that they eventually robbed and that Tartt was familiar with this bank because Tartt's wife had an account there. The Government corroborated this testimony with documentary proof that Tartt's wife had an account at this bank. The Government's proof also included two tellers who firmly identified Tartt at trial as one of the robbers. Finally, there was testimony that Tartt and Campbell were together on the day of the bank robbery. In view of this evidence, any error in admitting the checkered pants and blue jacket was harmless. See *United States v. Berenguer, supra*.*

* Moreover, even if the Campbell arrest or seizures were unlawful, Tartt has no basis to complain about the introduction against him of the evidence found in Campbell's apartment. Tartt did not move to suppress this evidence. Additionally, under well-settled law, Tartt had no standing to complain about the introduction of this evidence. See, *United States v. Tortorello*, 533 F.2d 809 (2d Cir.), cert. denied, 429 U.S. 894 (1976), and cases therein cited.

POINT II

The Courtroom Identification of Tartt Was In All Respects Proper.

Tartt argues that the in-court identification of him by one of the two bank tellers, Lena Jackson, was unfair and that "Judge Pierce abused his discretionary power in failing to hold [a] requested lineup." (Br. 30) This argument misstates the trial record and is without merit.

Prior to trial Tartt requested that a line-up be conducted, and on June 2, 1977, a lineup was held, attended by four bank employees.* The basis for Tartt's present claim is that Lena Jackson, a bank employee who did not attend the line-up, identified him at the trial. Apparently, Tartt now claims that the District Court's ruling permitting this identification was reversible error.

At trial, the Government first elicited from Mrs. Jackson her close observations during the robbery of the actions of the man the Government claimed was Tartt. Mrs. Jackson testified that she had observed this person intensely for 1-2 minutes as he approached her behind the counter, while he advised her of the robbery in angry terms, and as he proceeded to collect the money. (Tr. 78).

The prosecutor then asked whether Mrs. Jackson saw that man in the courtroom. Tartt's attorney asked to approach the side bar, where he objected to the in-court identification by Mrs. Jackson on the ground that the witness never had appeared at the earlier lineup. Tartt's

* Of the four witnesses who attended the lineup, one Pauline Wallaston, identified Tartt, two identified individuals who were not suspects and one was unable to identify anyone. (Tr. 457-59). At trial Wallaston again identified Tartt as one of the bank robbers. (Tr. 47-48). There is no explanation in the record for the fact that Mrs. Jackson did not attend the lineup.

objection was overruled and defendant did not make any further requests or alternative proposals. Mrs. Jackson then identified Tartt as one of the bank robbers.* (Tr. 81).

As to Tartt's first claim that the procedure was unfair, it is a complete answer that at no point prior to trial, or during the trial, did Tartt ask that Mrs. Jackson view him in a line-up. Tartt never asked whether the Government intended to elicit eye-witness identification from anyone other than the individuals who appeared at the line-up, nor did Tartt at any time seek a representation as to whether those present at the lineup exhausted the list of persons who had an opportunity to view him during the robbery.

Nor was Tartt entitled to a complete lineup. As this Court said in *United States v. Estremera*, 531 F.2d 1103, 1111 and 1112 (2d Cir.), *cert. denied*, 425 U.S. 979 (1976), "It is now established that a defendant has no constitutional right to a line-up." The Court explained that the defendant "could probably have obtained the equivalent of such a line-up when the witnesses later made their in-court identifications." Tartt never asked for such an equivalent line-up in the courtroom. *See also*, *United States v. Boston*, 508 F.2d 1171, 1176-78 (2d Cir. 1974), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Ravich*, 421 F.2d 1196, 1203 (2d Cir.), *cert. denied*, 400 U.S. 834 (1974).

Tartt also claims, without support, that the courtroom identification amounted to a showup, although he does not even allege that the procedure was unduly suggestive. *See Manson v. Brathwaite*, 97 S.Ct. 2243 (1977). In-

* At the time Tartt was identified by Mrs. Jackson, Tartt, his attorney, Campbell and Campbell's attorney all were seated at counsel table.

deed, Tartt claims no prejudice from the identification procedure at all, but boldly asserts that merely permitting this in-court identification was reversible error. In-court identifications, however, are not excludable unless an unduly suggestive showup procedure has created a substantial likelihood of irreparable misidentification. Moreover, the suggestiveness of the out of court identification need never be reached if there is a reliable independent basis for the identification in court. *Manson v. Brathwaite*, *supra*; *United States v. Green*, 561 F.2d 423 (2d Cir. 1977); *United States v. Bubar*, Dkt. Nos. 76-1140, 76-1161-64, 76-1204, 76-1306, slip op. 4519, 4528 (2d Cir., June 30, 1977). Under these prevailing standards, Tartt's claim must fail.

First, even if the question is reached, the in-court identification was not unduly suggestive. Jackson selected Tartt from both him and his co-defendant, Campbell, who was seated together with him at counsel's table. The mere fact that a defendant is seated in the courtroom at the defense table does not create an improper suggestion, particularly where the identifying witness is an average citizen, with no courtroom experience or motive to influence her testimony.* Moreover, the jury in this case actually observed the procedure used on the only occasion that Mrs. Jackson identified Tartt. Tartt's counsel was present at the identification and cross-examined Mrs. Jackson about her identification of Tartt and about her failure to attend the pre-trial line-up. (Tr. 82-89). Thus, there was a full and fair opportunity for the jury to assess the independent basis of the witness' identification.

* There is no basis for the assumption underlying Tartt's argument that a witness will simply identify the defendant seated at counsel table. See, e.g., *United States v. Lewis*, Dkt. No. 77-1224 Slip op. 451, 453-54 (2d Cir., November 21, 1977), where the witness incorrectly identified a Deputy United States Marshall.

Second, and more significantly, even though defense counsel never demanded a hearing on this question * the record absolutely supports the conclusion that Mrs. Jackson had a reliable basis for her identification. She had observed Tartt for one to two minutes while Tartt, who wore no mask, was close to her, and under intense circumstances which assured that his appearance would be indelibly fixed in her mind. Under such circumstances there simply was no very substantial likelihood of irreparable misidentification, *Manson v. Brathwaite, supra*; *United States v. Green, supra*; *United States v. Bubar, supra*; and the in-court identification therefore was entirely permissible.

* At the time his objection was overruled, defense counsel as an alternative could have sought, but did not, a hearing out of the presence of the jury to determine whether the witness' proposed identification was tainted or grounded in a reliable basis independent of her courtroom view. Having failed to seek such a hearing, Tartt cannot now complain that the in-court identification should have been suppressed.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
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LAWRENCE IASON,
ROBERT J. JOSSEN,
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Of Counsel.*



Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Lawrence Taron, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

That on the *23rd* day of
he served ^{Two copies} ~~a copy~~ of the within ~~brief~~
by placing the same in a properly postpaid franked
envelope addressed:

Ralph S. Naden, Esq.
277 Broadway
Room 106
New York, NY 10007

Julius Wasserstein, Esq.
26 Court Street
Suite 2312
Brooklyn, NY 11242

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing ⁱⁿ the United States Courthouse Annex,
One St. Andrew's Plaza, Borough of Manhattan, City
of New York.

Lawrence Taron

Sworn to before me this

23rd day of *January*

Mary L. Arent

MARY L. ARENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1979